

/ Position Paper

Priorities for the Digital Services Act Trilogues

March 2022

It has been over a year since the European Commission first unveiled the Digital Services Act (DSA) in December 2020, proposing a new set of EU-wide rules that would force the largest online intermediary services, including major social media platforms like Facebook, YouTube, Twitter and Tik Tok, to do more to tackle illegal content on their platforms.

From the outset, AlgorithmWatch welcomed the broad strokes in the DSA framework: In line with our previous recommendations on platform governance,¹ the Commission's proposal crucially upheld the conditional liability regime for platforms (with no general monitoring obligation), mandated new transparency and accountability measures, and included important safeguards for individual rights such as improved "notice-and-action" procedures and user redress mechanisms to dispute platforms' content moderation decisions. We also critically pointed out weaknesses in the proposal and called on policymakers to put meaningful transparency at the heart of the DSA.²

Following the Commission's initial proposal, the DSA entered a long legislative process in which both the European Parliament and the European Council amended and approved their own versions of the draft text. This set the stage for trilogue negotiations between the Parliament, the Council, and the Commission, in which the three bodies are now negotiating in order to reach a final, compromised version of the law.

Despite some shortcomings in the Parliament's draft position (its mandate for the trilogues), it is clear to us that Members of the European Parliament responded to civil society by establishing stronger positions on issues **including on data access for public scrutiny, independent audits, and advertising transparency**. If certain proposals advanced by the Parliament will not be agreed upon by the Commission and the Council, however, we fear this will severely undermine platform transparency and our collective ability to hold platforms accountable and uphold fundamental rights.

We believe that if the DSA is to achieve its aims of protecting fundamental rights, it must be built on meaningful transparency and accountability measures for online

¹ <https://algorithmwatch.org/en/submission-digital-services-act-dsa/>;
<https://algorithmwatch.org/en/governing-platforms-final-recommendations/>
² <https://algorithmwatch.org/en/dsa-response/>

platforms. Advocating for these principles, we have joined 11 other civil society organizations in calling for key outstanding issues to be resolved in the trilogues, including EU-level enforcement, due diligence requirements, data scrutiny and tackling systemic risks related to tracking-based advertising.³

Now, with the trilogue negotiations entering their final phase, key issues remain at stake – and the fine print of the law will have serious implications for the future of our public sphere. In this policy paper, **we urge lawmakers to prioritize the following concerns in the ongoing trilogues** relating to third-party data access for public scrutiny, independent audits, and advertising transparency.

Ensuring meaningful third-party scrutiny of Very Large Online Platforms (Art 31)

Long before AlgorithmWatch was forced by Facebook to shut down our Instagram monitoring project in 2021,⁴ we urgently advocated for a DSA which empowers watchdogs working in the public interest with the legal means to investigate systemic risks stemming from online platforms.

That is why we welcome Article 31 DSA, which enables access to data of Very Large Online Platforms (VLOPs) – not only for monitoring by the regulator but also for public interest research by vetted third parties. At the same time, **we strongly urge the Commission and the Council to support the Parliament's amendments on Article 31**, which: a) widen data access to vetted civil society organizations with proven expertise and representing the public interest, and b) remove the vague “trade secrets” exemption on the basis of which VLOPs could block requests for data access. **Our demands on data access and scrutiny are backed by significant support:** In two open letters,⁵ we received signatures from 50 civil society organizations and 38 international academics and independent researchers, as well as more than 6.000 public petitioners supporting our demands on Article 31 to lawmakers.

It is vital that the DSA provides for a meaningful and reliable vetting process to ensure that researchers are working in the public interest and following strict privacy guidelines, and to prevent the improper processing of data. **We also continue to advocate for the creation of an independent intermediary institution⁶** based on proven data-sharing practices for the purpose of vetting researchers and safely facilitating access to platform data.

AlgorithmWatch's experience with Facebook also shows that public interest researchers need a shield to protect them against platforms weaponizing their Terms of Service. The **threat of legal action** on the part of platforms has had a serious chilling effect on public interest researchers, which undermines our collective ability to hold platforms accountable. We welcome that Article 31 will

³ <https://algorithmwatch.org/en/joint-civil-society-briefing-for-the-dsa-trilogues/>

⁴ <https://algorithmwatch.org/en/defend-public-interest-research-on-platforms/>

⁵ <https://algorithmwatch.org/en/dsa-open-letter-november-2021/>

⁶ https://algorithmwatch.org/de/wp-content/uploads/2020/06/GoverningPlatforms_IVIR_study_June2020-AlgorithmWatch-2020-06-24.pdf

compel platforms to grant researchers access to certain data; however, **researchers still need legal clarity on research methods such as data donation projects to guarantee that platforms won't simply abuse their power** by using their Terms of Service as a weapon to shut down privacy-compliant public interest research conducted in good faith.

Article 31 is a crucial component of the DSA's accountability structure that would also importantly complement other accountability measures – for example, independent audits resulting from Article 28 – given that third-party researchers' findings may verify, add to, and/or diverge from findings which are reported by independent auditors.

As the pressure on the DSA negotiations ramps up, we urge policymakers not to rush to a weakened compromise on Article 31 – getting this right is key to ensuring meaningful transparency at the heart of the DSA.

Safeguarding the integrity and effectiveness of independent audits (Article 28)

It is essential that auditors be truly independent from platforms if audits are to be more than just a box-ticking exercise. **That is why we support important amendments proposed in the Parliament's position on Article 28**, including amendments that help guarantee auditors' independence from platforms and beef up auditors' reporting requirements, as well as outline new powers for the Commission vis-à-vis auditors:

Most importantly, the DSA must ensure that auditors are truly independent from platforms. To this end, the Parliament's text clarifies that auditors must be both legally and financially independent from, and have **no conflicts of interest** with the platform concerned (or with any other VLOP). It further specifies a 24-month window in which auditors & their employees may not provide services to the VLOP in question or to any professional/business associations in which the VLOP is a member. **VLOPs must also ensure that auditors have access to all relevant data to do their work properly**, as specified by the Parliament in Art 28(1 a).

In addition to the requirements laid out by the Commission, the Parliament's text importantly adds **beefed up requirements for audit reports**, including: a description of third parties consulted as part of the audit; a description of elements that could not be audited (and explanation as to why); if a conclusion cannot be reached under the scope of the audit, a statement explaining the reason for the failure. **These amendments proposed by Parliament on Article 28(3) are essential to allow for increased reliability of audit reports**, increasing accountability not only for platforms but for the auditors themselves.

We also support the Parliament's position on Article 28 granting **new powers and responsibilities for the Commission vis-à-vis auditors**. This proposal specifies that auditors must be recognized and vetted by the Commission, and that the

Commission must maintain a database of vetted auditing organizations. These provisions will enable the Commission to act as an important check on the independent auditing system through the vetting process, which would further ensure the veracity and independence of auditors.

Stronger transparency for targeted advertising (Article 30)

Months before the Commission unveiled the DSA proposal, AlgorithmWatch joined the European Partnership for Democracy and many other partners in calling for “Universal Advertising Transparency by Default”.⁷ **While we welcome Article 30 for requiring VLOPs to publish more comprehensive advertising libraries, it must be strengthened in line with the Parliament’s text** to allow for meaningful public interest scrutiny around targeted advertising practices and to help regulators and watchdogs to enforce online advertising regulations.

Though we are disappointed that Article 30 omits certain provisions,⁸ the Parliament’s positions are crucial if ad libraries are to **properly verify advertisers, expose illegal and unethical discrimination in targeted ads, and allow transparency for ads that have been taken down.**

First, the Parliament’s position would require disclosure of the identity of ad buyers, which is important for helping to reveal the true sources behind politically motivated ads in particular. This would help regulators and watchdogs to investigate and regulate opaque influence campaigns and expose “dark money” flowing through these campaigns.

Second, ad libraries should also be a tool to expose illegal and unethical discrimination in targeted ads: In addition to disclosing the main parameters of targeting data, **platforms must disclose the criteria for exclusion which have been selected by ad buyers** as proposed in the Parliament’s text. This is crucial to enable watchdogs to detect illegal or unethical instances of discrimination in targeted ads, i.e., when one or more specified groups have been excluded from seeing the ad.

Third, ad transparency is not only important to scrutinize live ads – it is just as important that watchdogs be able to evaluate ads that have been taken down. That is why we welcome the Parliament’s position that **information for banned ads should also remain in the ad repository for public scrutiny,**⁹ as retroactive ad removals undermine the integrity of data for researchers.

⁷ <https://algorithmwatch.org/en/wp-content/uploads/2020/09/joint-call-for-universal-ads-transparency.pdf>

⁸ E.g., the proposal does not require ad libraries to disclose spending data, which is an unjustifiable omission given how relevant spending data is for public scrutiny - and is also step backward from self-regulation, given that spending data are already included in existing ad archives like the Facebook Ad Library.

⁹ Either in accordance with Article 14 or with an order issued pursuant to Article 8 re: illegal content.

A strong EU-level enforcement regime for VLOPs (Article 50)

In its General Approach, the Council's DSA proposal dramatically alters the enforcement regime by transferring powers from the Digital Services Coordinators of establishment for VLOPs (Ireland or Luxembourg) to the European Commission. **We support this stronger EU-level enforcement structure**, and recommend giving enforcement powers to an independent unit inside the Commission to oversee VLOPs. If matched with adequate resources, we believe that independent EU-level enforcement powers will allow for deep and consistent checks of VLOP's compliance with due diligence measures from the outset and help to avoid the bottleneck experienced with GDPR enforcement.

Conclusion

The DSA promises to rebalance the structure of power between large platforms, regulators, and individuals for the better protection of fundamental rights. If the DSA is to uphold its promises, we need EU negotiators to deliver an Act which is built on meaningful transparency for platforms. Only by better understanding how platforms influence our public sphere will we then have the collective ability to hold them accountable.